PT BANK MANDIRI (PERSERO) TBK A

v.

KARAMBUNAI CORP BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
HAMID SULTAN ABU BACKER JC
[COMPANIES (WINDING UP) NO: K28-54-2004]
20 JUNE 2007

COMPANY LAW: *Winding up - Locus Standi - Right to wind up company absolutely at discretion of court - Creditor must satisfy court that it has locus standi to present petition - Company must be unable to pay its debt - Must be a bona fide claim and not an attempt to recover disputed debt - Whether petitioner fell into any of categories mentioned in s. 218(2) of Companies Act 1965 - Whether petition can be presented in Malaysia when parties had agreed to exclude jurisdiction of Malaysian Courts* C D

COMPANY LAW: *Winding up - Opposition to petition - Petition filed in Malaysia when parties had agreed to exclude jurisdiction of Malaysian Courts - Petition based upon substantially disputed debt - Whether companies winding up court appropriate forum to deal with disputed debt* E

COMPANY LAW: *Winding up - Damages - Whether assessment of damages can be ordered against petitioner - Companies winding up court can entertain claim for damages where foreign based petitioner has abused process of court*

By a guarantee dated 30 January 1997 executed by the company in favour of the petitioner and several other institutions ("the Lenders"), the company agreed to unconditionally and irrevocably guarantee the punctual payment by Sunnyland Industries Ltd, a company incorporated in Hong Kong ("the Borrower") of its obligations under a Facility Agreement relating to a term loan facility of US$12,000,000 granted by the Lenders to the Borrower. The Borrower failed to make payment of the sum due within the prescribed time thereby constituting an event of default under the facility agreement. The petitioner had served notice pursuant to s. 218 of the Companies Act 1965 ('CA 1965') on the company but still no payment was received. As such, on the grounds that the company was unable to pay its debts, the petitioner claimed that it was just and equitable that the company should be wound up. The respondent, *inter alia*, objected on the following grounds: (a) that the facility agreement and the guarantee were to be governed by the laws of Singapore; (b) that subsequent to the facility agreement, several discussions and negotiations were held between the parties, whereby the terms of the facility agreement were varied by agreement, particularly the F G H I

mode and source of repayment and that in breach of this agreement, the petitioner wrongfully insisted on enforcing the original terms of the said facility agreement; (c) that the petitioner had been levying excessive interest and therefore there was a need to take an account; (d) that the presentation of and/or continuation of a winding up petition against the respondent on the basis of a disputed debt will have serious irreversible effect and cause untold loss and damage.

Held (dismissing the petition):

(1) Section 218 of the CA 1965 makes it clear that the right to wind-up the company is absolutely at the discretion of court and the section does not give any person or body any substantive right to wind-up the company. (para 5)

(2) The *sine qua non* for seeking a winding up order by a creditor is that the creditor must satisfy the court on the face of the petition that he has *locus standi* to present the petition and convince the court that the company is unable to pay its debt. Where the petition is not based on a judgment sum, the petitioner must show the claim is *bona fide* and is not an attempt to recover disputed debts through courts' process in a summary nature. (para 7)

(3) The petitioner in this case did not fall into any of the categories mentioned in s. 218(2) of CA 1965. (para 11)

(4) The petitioner stated that the guarantee was given to the lenders. The lenders consisted of five corporate bodies. The petitioner *per se* cannot be said to be the lender. At the most it could only be one of the lenders. The petitioner had not identified its *locus standi* in the petition in clear terms to show that the petitioner could present the petition in the absence of other lenders, more so in Malaysia without obtaining a judgment according to the laws of Singapore as parties to the guarantee had agreed that the laws of Singapore will apply. (para 11)

(5) The guarantee was drafted in a manner by lenders who were foreigners to exclude the jurisdiction of the Malaysian Courts. The petitioner had blatantly abused the terms of the guarantee by filing this petition in Malaysia when the lenders did not want any of their dispute to be dealt by the Malaysian Courts. (para 11)

(6) The claim of the petitioner was grounded on complicated questions and matters requiring proper investigation and it cannot be summarily determined by affidavit evidence. A person cannot be said to be a creditor, where the alleged debt is substantially disputed. The company court is not the forum to deal with disputed debts.

The petitioner had no *locus standi* to present this petition and the debt was *bona fide* disputed and the petitioner had not proved their case according to law. (paras 12 & 13)

(7) In the circumstance of the case it will be appropriate to order assessment of damages against the petitioner notwithstanding the general rule that a companies winding up court will not entertain a claim for damages. In this case exception must be made as the petitioner was foreign based and should not be allowed to avoid the jurisdiction of the Malaysian Courts after having abused its process. The court has powers and jurisdiction to do so where justice demands. (para 13)

Case(s) referred to:

Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd [1981] 3 All ER 577 ***(refd)***

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 356 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Brunsfield Information Technology Sdn Bhd v. Masterloq Technologies Sdn Bhd [2003] 1 LNS 352 HC ***(refd)***

Charles Forte Investments, Ltd v. Amanda [1963] 2 All ER 940 ***(refd)***

Chellaradh & Co Ltd v. MVK Sundaram & Anor AIR [1955] Mysore 122 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 ***(refd)***

Ganda Holding Bhd v. Pamaron Holding Sdn Bhd [1989] 2 CLJ 1014; [1989] 1 CLJ (Rep) 559 HC ***(refd)***

Hartley v. Hymans [1920] All ER Rep 328 ***(refd)***

JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd [2002] 2 CLJ 345 HC ***(refd)***

Joseelyne v. Nissen and Another [1970] 1 All ER 1213 ***(refd)***

Jurupakar Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49 ***(refd)***

Liverpool City Council v. Irwin & Anor [1977] AC 239 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Malayan Plant (Pte.) Ltd v. Moscow Narodny Bank Ltd [1980] 2 MLJ 53 ***(refd)***

Malta Timber Products Sdn Bhd v. N & P Construction Sdn Bhd [2004] 1 MLJ 119 ***(refd)***

Mann and Another v. Goldstein [1968] 1 WLR 1091 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC ***(refd)***

Mister Broadloom Corporation (1968) Limited Plaintiff (Appellant) and Bank of Montreal and The Clarkson Company Limited Defendants (Respondents) [1983] ACWSJ LEXIS 21370 ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 SC ***(refd)***

A *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653* ***(refd)***
Muthusamy v. Subramaniam [1965] 2 MLJ 273 ***(refd)***
Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 ***(refd)***
Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd [1991] 1 MLJ 338 ***(refd)***
Paoutsos v. Raymond Hadley Corporation of New York [1916-17] All ER Rep
B *448* ***(refd)***
Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd [1999] 5 CLJ 145 HC ***(refd)***
Quah Ban Poh v. Dragon Garden Pte Ltd [1985] 2 MLJ 159 ***(refd)***
Quennell v. Maltby and Another [1979] 1 All ER 568 ***(refd)***
R Rama Chandran v. The Industrial Court Malaysia & Anor [1997] 1 CLJ 147
C *FC* ***(refd)***
Re A company (Ch D) [1984] 1 WLR 1090 ***(refd)***
Re British India General Insurance Co AIR [1971] Bombay 102 ***(refd)***
Re Bryant Investment Co Ltd [1974] 2 All ER 683 ***(refd)***
Re Great Eastern Hotel (Pte) Ltd [1989] 1 MLJ 161 ***(refd)***
Re LHF Wools, Ltd [1969] 3 All ER 882 ***(refd)***
D *Re Lympne Investments Ltd [1972] 2 All ER 385* ***(refd)***
Re Mechanised Construction Pte Ltd [1989] 3 MLJ 9 ***(refd)***
Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd [1986] 2 MLJ 374 ***(refd)***
Re Siow Ah Moi, Ex parte United Orient Leasing Company Berhad [2007]
E *8 CLJ 104 HC* ***(refd)***
Re Sunshine Securities (Pte) Ltd [1978] 1 MLJ 57 ***(refd)***
Re Tweed Garages Ltd [1962] 1 All ER 121 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1985] 1 MLJ 84 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***
F *Stonegate Securities Ltd v. Gregory [1980] 1 All ER 241* ***(refd)***
Tang Choon Keng Realty (Pte) Ltd & Ors v. Tang Wee Cheng [1992] 2 SLR 1114 ***(refd)***
Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 1 MLJ 701 ***(refd)***
The Company v. Rameshwar Singh of Darbhanga AIR 1920 Calcutta 1004 ***(refd)***
Tulsidas Lalubhai v. Bharatkhand Cotton Mills Co, Ltd AIR [1914] Bombay 251
G ***(refd)***
Viking Consultants Pte Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn Bhd [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321 HC ***(refd)***
Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v. Grand United Holdings Bhd [1985] 5 MLJ 345 ***(refd)***
Wee Kah Lee v. Silverdale Investment Pte Ltd [2000] 4 SLR 429 ***(refd)***
H *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 CA* ***(refd)***

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Legislation referred to:
Bankruptcy Act 1967, s. 4
Companies Act 1965, s. 218(1)(e), (2)(a)
Evidence Act 1950, ss. 3, 101
Federal Constitution, art. 13(1)

For the petitioner - Norbert Yapp; M/s Jayasuriya Kah & Co Advocates
For the respondent - Sri Marina Tiu; M/s Yap Chin & Tiu Advocates

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the winding up petition filed pursuant to s. 218(1)(e) of the Companies Act 1965 (CA 1965) to be read with s. 218(2) of the Act.

[2] The petitioner says the respondent's liability arises out of a guarantee. The respondent rigorously disputes the debt as well as the quantum of the petitioner's claim. The respondent complains that the petitioner has caused much loss and damage to the respondent by filing this petition. A number of affidavits have been filed in this action and the issues raised are extremely contentious. The claim of the petitioner is not based on a simple debt and the petitioner is only one of the named lenders reflected in the guarantee. The petitioner and the respondent have relied on the following cases: (i) *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 (ii) *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 (iii) *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 (iv) *JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd* [2002] 2 CLJ 345 (v) *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51 (vi) *Re Tweed Garages Ltd* [1962] 1 All ER 121 (vii) *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC (viii) *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591 (ix) *Pioneer Concrete (Malaysia) Sdn Bhd v. Celini Corporation Sdn Bhd* [1999] 5 CLJ 145 (x) *Re Sunshine Securities (Pte) Ltd* [1978] 1 MLJ 57 (xi) *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 (xii) *Amalgamated Investment & Property Co. Ltd (in liquidation) v. Texas Commerce International Bank Ltd* [1981] 3 All ER 577 (xiii) *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 FC (xiv) *Brunsfield Information Technology*

A *Sdn Bhd v. Masterloq Technologies Sdn Bhd* [2003] 1 LNS 352 (xv) *Charles Forte Investments, Ltd v. Amanda* [1963] 2 All ER 940 (xvi) Companies Act and Companies Regulations [Sections 217(1)(b) & 221] (xvii) *Hartley v. Hymans* [1920] All ER Rep. 328 (xviii) *Joseelyne v. Nissen and Another* [1970] 1 All ER 1213 (xix) *Jurupakar Sdn Bhd v.* B *Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49 (xx) *Liverpool City Council v. Irwin & Anor* [1977] AC 239 (xxi) *Malayan Plant (Pte.) Ltd. v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (xxiii) *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 (xxiii) *Malta Timber Products Sdn Bhd v. N &* C *P Construction Sdn Bhd* [2004] 1 MLJ 119 (xxiv) *Mister Broadloom Corporation* (1968) *Limited Plaintiff (Appellant) and Bank of Montreal and The Clarkson Company Limited Defendants (Respondents)* [1983] ACWSJ LEXIS 21370 Ontario Court of Appeal (xxv) *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653 (xxvi) *Muthusamy v. Subramaniam* [1965] 2 MLJ 273 (xxvii) *Ng Ah Kway v.* D *Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58 (xxviii) *Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338 (xxix) *Paoutsos v. Raymond Hadley Corporation of New York* [1916-17] All ER Rep. 448 (xxx) *Quah Ban Poh v. Dragon Garden Pte Ltd* [1985] 2 MLJ 159 (xxxi) *Quennell v. Maltby and Another* [1979] 1 All ER 568 (xxxii) *Re A* E *company (Ch D)* [1984] 1 WLR, 1090 (xxxiii) *Re Bryant Investment Co Ltd* [1974] 2 All ER 683 (xxxiv) *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161 (xxxv) *Re L.H.F. Wools, Ltd* [1969] 3 All ER 882 (xxxvi) *Re Lympne Investments Ltd* [1972] 2 All ER 385 (xxxvii) *Re Mechanised Construction Pte Ltd* [1989] 3 MLJ 9 (xxxviii) *Re Nima Travel Sdn Bhd* F *Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd* [1986] 2 MLJ 374 (xxxix) *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1985] 1 MLJ 84 (xxxx) *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241 (xxxxi) *Tang Choon Keng Realty (Pte) Ltd & Ors v. Tang Wee Cheng* [1992] 2 SLR 1114 (xxxxii) *Teh Poh Wah v. Seremban Securities* G *Sdn Bhd* [1996] 1 MLJ 701 (xxxxiii) *Viking Consultants Pte Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn Bhd* [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321 (xxxxiv) *Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v. Grand United Holdings Bhd* [1985] 5 MLJ 345 (xxxxv) *Wee Kah Lee v. Silverdale Investment Pte Ltd* [2000] 4 SLR 429.

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[3] The petitioner's reasons for presenting the petition is set out in paras. 5 to 11 of the petition and reads as follows:

> 5. By a Guarantee dated 30th January 1997 executed by the Company in favour of (i) PT Bank Ekspor Impor Indonesia I (Persero), Singapore branch (now known as PT Bank Mandiri (Persero) Tbk., Singapore branch) in its capacity as Arranger, Agent and Security Agent) and (ii) the financial institutions

comprising (a) PT Bank Mandiri (Persero) Tbk., Singapore branch, (b) Sime International Bank (L) Ltd (whose rights and interests in and under the Facility Agreement and the Guarantee are now held by Credit Suisse First Boston International with effect from 3.11.2004), (c) Sembawang Capital Pte Ltd and (d) London Forfaiting Company Ltd (previously known as London Forfaiting Asia Ltd) (the financial institutions are hereinafter collectively referred to as "the Lenders"), the Company agreed to unconditionally and irrevocably guarantee the punctual payment by Sunnyland Industries Ltd, a company incorporated in Hong Kong (hereinafter referred to as "the Borrower") of its obligations under a Facility Agreement dated 30 January 1997 relating to a term loan facility of US$12,000,000.00 granted by the Lenders to the Borrower. A copy each of the aforesaid Guarantee and the Facility Agreement are attached herewith marked "A" and "B" respectively.

6. At the request of the Borrower and the Company, the Lenders by a Supplemental Agreement dated 3rd March 2003 agreed to restructure the principal outstanding under the Facility Agreement (amounting to US$5,530,568.02) subject to the terms and conditions stipulated therein. A copy of the aforesaid Supplemental Agreement is attached hereto marked "C".

7. As at 29th November 2004, the Company is indebted to the Lenders in the sum of US$5,357,150.69. Interest shall continue to accrue at the rate of 8.5% per annum.

8. On the 30th November 2004 Your Petitioner by facsimile made an application to the Borrower and Company for payment of the sum due but no payment was made within the prescribed time thereby constituting an event of default under the Facility Agreement. A copy of the said Notice is annexed hereto marked "D".

9. Your Petitioner had under the hands of its solicitors made another application to the Company for the payment of the debt due by service of a Notice pursuant to section 218 of the Companies Act, 1965 by way of personal service at the Company's business address at 1, Nexus Drive East, Karambunai, Menggatal, Kota Kinabalu, Sabah but no payment was received from the Company after service of the said Notice. A copy of the said Notice is annexed hereto and marked "E".

10. The Company is unable to pay its debts.

11. In the circumstances it is just and equitable that the Company should be wound up.

[4] The respondent, *inter alia*, objects on various grounds and the reasons can be summarized as follows:

(a) sometime on or about the end of 1996, the respondent pursued a privatisation project for essentially, the construction of a road in Guangdong Province in China (hereinafter referred to as "the Project") through its wholly owned subsidiary, Sunnyland Industries Ltd (hereinafter called "Sunnyland"). (b) for purposes of funding the project, Sunnyland obtained a term loan of US$12,000,000 under a facility agreement dated 30 January 1997, entered between Sunnyland and the petitioner and syndication with other lenders, which agreement was to be governed by the laws of Singapore (hereinafter referred to as "the facility" and "the facility agreement" respectively). (c) the respondent was the guarantor for the facility and executed the guarantee dated 30 January 1997, which was to be governed by the laws of Singapore (hereinafter referred to as "the guarantee"). (d) subsequent to the facility agreement, several discussions and negotiations were held between the parties, whereby the terms of the facility agreement were varied, particularly the mode and source of repayment, *vide* the following: (i) letter agreement dated 27 September 2001; and (ii) deed of assignment dated 27 September 2001. (e) by virtue of the said letter agreement and deed of assignment, and subsequent discussions and negotiations: (i) the proceeds (repatriation proceeds) from the disposal of Sunnyland's equity interest in the joint-venture company involved in the project was to be utilised towards repaying the amounts due under the facility. (ii) the repatriation proceeds was assigned to the petitioner and the sum amounting to US$4,893,360.78 was paid to the petitioner. (iii) it was also agreed that the then balance outstanding sum of US$7,111,428.99 was to be repaid from, (i) the remaining repatriation proceeds upon the dissolution of Sunnyland Yunfu and (ii) the proceeds, of a rights issue exercise that was then being undertaken by the respondent and then contemplated to be completed by November 2001. (f) in reliance on the positive indication from the petitioner towards the varied mode and source of repayment, a further payment of RM3,000,000 was made to the petitioner on or about 28 April 2002. (g) on or around May 2002, following negotiations and discussions which commenced in or around December 2001, whereby the Facility was restructured broadly along the following lines, that is to say, the repayment terms and schedule thereof was amended to provide: (i) that the repayment of the Facility is to be settled from the proceeds of the sale of Hartamas Group Berhad shares (hereinafter referred to as "the HGB Shares") to be issued to the respondent upon completion of the a scheme of arrangement in respect of Sri Hartamas Bhd and from the balance of the repatriation proceeds being RMB5,835,106 at the material time; and (ii) for the repayment of 20% of the outstanding under the facility every 30 days from either the date of

the issuance of the HGB Shares or 31 December 2002, whichever is the earlier. A supplemental agreement reflecting the further variation was drawn up on or around the middle of 2002 (hereinafter referred to as "the said supplemental agreement') for execution at that time. However the said supplemental agreement was only executed on 3 March 2003. (h) the respondent avers that (a) during and in the course of the negotiations for the said supplemental agreement, it was the intention and understanding of both parties that the extension for the repayment schedule would be from or by reference to the date of the extension of the resulting agreement, the true intention being to give the respondent time from the date of such agreement and time to realize the proceeds from the sale of the HGB Shares in which to settle the outstanding account. (b) at the time of the negotiations of the further variation aforesaid, the completion of the scheme of arrangement and the issuance of the HGB Shares was-expected to be in May 2002 and the date of 31 December 2002 was worked out on that expectation; (c) the said supplemental-facility agreement was only executed on 3 March 2003 and the repayment date stated at p. 8 of the agreement should have been "31 December 2003" and not "31 December 2002". (d) however at the time of the execution, the stipulated date at p. 8 was inadvertently overlooked and was not amended (i) the respondent further avers that the respondent - and Sunnyland had at all material times taken all steps to comply with the said supplemental agreement: (a) although the dissolution of Sunnyland is and was at the material time still on-going and yet to be completed, the respondent managed to obtain the release of US$1,414,567.78 from the repatriation proceeds to the petitioner on or around 25 January 2002 and subsequently for the remaining balance of the repatriation proceeds to be released to the petitioner in May 2003; and (b) the respondent had with the knowledge of the petitioner actively pursued the completion of the scheme of arrangement involving Sri Hartamas Berhad aforesaid. (j) since the execution of the said supplemental facility agreement, the following have taken place: (a) the proposed scheme of arrangement involving Sri Hartamas Berhad has been terminated by the special administrator of Sri Hartamas Berhad on or around 1 October 2004. (b) the respondent had approached the petitioner in June 2004 to indicate that in the light of the delay in the issuance of the HGB Shares the respondent will endeavour to make the repayments from the sum in excess of RM9,000,000 that was due and owing to a subsidiary of the respondent by the Melaka State Development Corporation. On 24 July 2004, the Melaka State Development Corporation had not come up with the monies but offered to settle part of the sums in kind in the form of three properties, which the

respondent in turn offered to the petitioner as security. The petitioner however, unreasonably refused the offer. (k) in breach of the aforesaid agreement between the respondent and the petitioner on the mode and source of repayment, the petitioner wrongfully insisted on enforcing the original terms of the said facility agreement despite the aforesaid variation, and wrongfully and unlawfully issued a notice under s. 218 of the CA 1965 to the respondent (hereinafter referred to as "the s. 218 notice"). (l) the respondent received the s. 218 notice dated 28 September 2004 issued by Messrs. Jayasuriya Kah & Co of Kota Kinabalu on behalf of the petitioner, threatening to institute winding up proceedings against the respondent unless the sum of US$5,247,946.09 was paid up. (m) the respondent avers that the petitioner is not legally entitled to issue the s. 218 Notice and/or to present a petition against the respondent for, *inter alia*, the following reasons: it was agreed between the parties under the letter agreement dated 27 September 2001 that the repayment of the outstanding under the facility shall be from the repatriation proceeds and the rights issue proceeds and only from those funds. (b) it was further agreed between the parties under the said supplemental facility agreement dated 3 March 2003 that the repayment of the outstanding shall be from the remaining repatriation proceeds and from the disposal of the Hartamas Shares (c) given that the scheme of arrangement leading to the issuance of the HGB Hartamas Shares have been aborted, clearly the obligation to repay on the part of the respondent now stands to be re-regulated but not unilaterally by the petitioner given that the original Facility is no longer to be relied upon in light of the aforesaid letter agreement and the said supplemental agreement. (d) the respondent has also now realised that the petitioner has been levying excessive interest and therefore there is a need to take an account. (n) the respondent also avers that the presentation of and/or continuation of a winding up petition against the respondent on the basis of a disputed debt will have serious irreversible effect and cause untold loss and damage for, *inter alia*, the following reasons: (a) the respondent is a public listed company with a total asset base of approximately RM1,800,000,000 comprising of non-current assets of RM1,435,111,736 and current assets of RM406,660,857 at Group level against borrowings of approximately only RM520,000,000. (b) as at 31 March 2004, the respondent's net tangible asset is around RM872,925,665 or its equivalent in US$228,215,860.10. (c) the respondent is a major contributor to the local economy including *inter alia:* (i) employing directly or indirectly 1,000 people in connection with, *inter alia*, the operations

of the Nexus Resort and other projects, whose livelihood will be seriously affected, and (ii) procuring services, supplies and goods worth up to RM81,000,000 per annum from the local populace: in connection with the operations of the said Nexus Resort and other projects.

[5] Circumstances in which a company can be wound up are set out in s. 218 of the CA 1965. This section makes it clear that the right to wind-up the company is absolutely at the discretion of court and the section does not give any person or body any substantive right to wind-up the company. An apt simile to this section, is s. 4 of Bankruptcy Act 1967 (BA 1967) which state as follows:

> Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, the Court may on a bankruptcy petition being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order.

[6] Under s. 4, the court can only make a person a bankrupt if the creditor can satisfy the court that it is necessary for such an order for the protection of the estate of the debtor. If the debtor is a person having no asset like a pauper, tramp or vagrant or for that matter, dependants who do not have assets, a receiving order cannot be made as it will serve no useful purpose for the creditors and it will be against the object of the BA 1967. I have dealt with this issue in *Re Siow Ah Moi @ Seow Yin Fong Ex parte United Orient Leasing Company Berhad* [2007] 8 CLJ 104, where I have stated:

> The submission of the respondent appears to be grounded on the basis that the creditor can at all times keep the bankrupt as a bankrupt until the bankrupt settles all of the obligation pursuant to law. I think that is not the purpose of the BA 1967. The object of the Act which I think is a social legislation to protect the bankrupt can be recognized as follows:
>
> (a) to secure fair and equal distribution of available property among the creditors;
>
> (b) to free the debtor from his debts so that he can make a fresh start as soon as he is discharged by the court;
>
> (c) to deter people from rashly incurring debts they cannot pay;
>
> (d) to vest the debtor's assets in the Director General of Insolvency for equal distribution to creditors; and
>
> (e) finally to discharge the debtor from bankruptcy and restore his civil status.

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I think it is now an opportune moment for me to say that it is wrong for creditors to think that they have a substantive right given by law to make a person a bankrupt or continue to keep them a bankrupt until their natural death. In my view it has never been the intention of
B parliament to give absolute right to creditors to make a person a bankrupt. The discretion to make a person a bankrupt is entrusted to the courts and the courts can exercise the discretion not to make a person bankrupt according to the justice of the case. The relevant provision of the BA 1967 is section 4 which states as follows:

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> Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, **the Court may on a bankruptcy petition** being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order. (Emphasis added).

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Further, the court is vested with the jurisdiction to discharge the bankrupt. In ordinary circumstances the court will make a person bankrupt if the conditions stated in section 5 of the BA 1967 is satisfied. It must be asserted that for all general principles and rules there are always exceptions. It may be recognized exceptions pursuant
E to case laws or possible exceptions to be confirmed by case laws. This is an area where there appears to be a slow progress or no progress by jurist and judgments of courts within the bankruptcy regime to ensure deserving cases are not made a bankrupt to ensure civil liberties guaranteed under the federal constitution are preserved according to the justice of the case.

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[7] The *sine qua non* for making a person a bankrupt is that the creditor must show that the debtor has some assets to trigger the bankruptcy regime. This is a statutory requirement as set out in s. 4 of BA 1967. In contrast, the *sine qua non* for seeking a winding up
G order by a creditor is that the creditor must satisfy the court on the face of the petition that he has *locus standi* to present the petition and convince the court that the company is unable to pay its debt. Where the petition is not based on a judgment sum, the petitioner must show the claim is *bona fide* and is not an attempt to recover disputed debts
H through courts' process in a summary nature. It will be abhorrent to notion of justice and fair play to entertain an application for a winding up petition on a disputed sum without allowing the respondent to ventilate the grievance according to substantive law and this proposition is an entrenched constitutional right well articulated in art. 13(1) of the Federal Constitution. Section 218 of CA 1965 cannot be read in isolation
I of the Federal Constitution and deprive the asset of a person in a summary manner when the law permits the issues to be ventilated upon

proper judicial scrutiny. It is wrong to rely on English decisions totally relating to s. 218(1)(e) when England stands as a country without constitution such as art. 13 of the Federal Constitution which states:

> 13. (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[8] Section 218(1)(e) of CA 1965 reads as follows:

> (1) The Court may order the winding up if:
>
> …
>
> (e) the company is unable to pay its debts.

This section *per se* does not give a substantive right to the creditor to wind up the company. There is a duty and obligation for the creditor to show that he is a creditor within the intent and meaning of s. 218 and demonstrate to the court that the company is unable to pay its debt. Definition of inability to pay the debts is set out in s. 218(2) of the CA 1965 which reads the follows:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

The requirements set out in the above section can only be satisfied if adherence is made as far as possible to ss. 3 and 101 of the Evidence Act 1950 (EA 1950). I say here as far as possible because EA 1950

does not apply to affidavits but the courts need to rely on it for s. 218(2)(a) says inability to pay must be proved to the satisfaction of the court. I have set out the scope of ss. 3 and 101 in some detail in the case of Kuching High Court CRA-41-20-2006-II *PP v. Mohd. Aszzid Abdullah* where the judgment was delivered on 18-06-2007 and the relevant part reads as follows:

> 10. As the crux of the issue related to this appeal materially depends on the question of *prima facie* case, in my view to appreciate and understand this concept in the right perspective, it is essential to read the relevant provisions of the CPC with EA 1950. In almost all the cases which dealt with the issue relating to *prima facie* case, the courts did not deal with the EA 1950 and in my view much confusion has been caused, before the decision of the Federal Court in *Balachandran (supra)*.
>
> 11. A *prima facie* case materially consists of more than two concepts related to EA 1950. They are issues relating to standard of proof [see s. 101 to 103 EA 1950] and weight of evidence or also referred to as probative value or probative force [see section 3 of EA 1950]. A *prima facie* case cannot be equated to burden of proof alone. Further, a *prima facie* case cannot be equated to the concept of maximum evaluation of evidence only. However, to define a *prima facie* case, the element relating to the standard of proof and weight of evidence becomes inextricably interwoven. The phrase maximum evaluation or minimum evaluation or credible evidence is not a term of art used in common law jurisprudence in the law relating to evidence. The nearest equivalent to this term in the law of evidence will be in my view, weight of evidence or probative value etc. Further maximum or minimum evaluation or credible evidence does not relate to standard of proof. Because these terminologies, when they first appeared in Malaysian cases, were not explained within the regime of EA 1950, they may in my view have lead to much confusion and this is reflected in the submission of the prosecution, as the prosecution had relied on the following cases namely: (i) *Munusamy v. PP* [1987] 1 MLJ 492 (ii) *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1 (iii) *PP v. Tan Sri Muhammad bin Muhammad Taib* [1999] 2 MLJ 305 (iv) *PP v. Saare Hama & Anor.* [2001] 4 CLJ 380 (v) *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 (vi) *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597 (vii) *Hwa Tua Tau v. PP* [1981] 1 CLJ 123 (viii) *Tan Chai Keh v. PP* [1948 – 49] Supp 105 (ix) *PP v. Kasmin Soeb* [1974] 1 MLJ 230 (x) *Khoo Hii Chiang v. PP* [1994] 2 CLJ 151 SC (xi) *Dato' Mokhtar Hashim v. PP* [1983] 1 CLJ 101 (xii) *PP v. Krishna Rao a/l Gurumurthi* [2000] CLJ 446 (xiii) *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215 (xiv) *PP v. Sukumaran a/l Sudram* [1999] 4 CLJ 242 (xv) *PP v. Ong Cheng Heong* [1998] 4 CLJ 209 (xv) *PP v. chin Yoke* [1940] MLJ 47 (xvi) *PP v. Mohan Singh* [1999] 4 CLJ 620 (xvii) *Balachandran v. PP* [2005] 1 CLJ 85.

12. The word 'proof' means anything, which serves to convince the mind about the truth or falsehood of a proposition. Under section 3 of EA 1950 a fact is said to be proved when after considering the matters before it, the court either: (a) believes it to exist; or (b) considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. The extent to which a particular piece of evidence aids to prove a fact in issue is called its probative force. It is necessary for the probative force to be sufficient to induce the court: (i) to believe in the existence of the fact; and/or (ii) to consider its existence so probable that a prudent man may act upon the supposition that it exists. The test whether a matter has been proved or not is objective in nature and the test is-would a prudent man, after considering the matters before him deem the fact in issue proved or disproved. The word 'disproved' is exactly the opposite of 'proved' and is defined again in section 3 of EA 1950 to emphasise its importance. A fact is said to be disproved when, after considering the matter before it, the court either: (a) believes that it does not exist; or (b) considers its non-existence so probable, that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. The term 'not proved' is explained in section 3 of the EA 1950. A fact is said to be not proved when: (a) it is neither proved; (b) nor disproved. When a fact has not been proved by the party on whom the burden lies, that is to say, when the said party has given no evidence or has given evidence, which is not sufficient to establish the fact, the fact is said to be not proved. There is a useful maxim: 'falsus in uno falsus in omnibus' which means if a thing is false in respect of one it must be taken to be false in respect of all. [See *Nisar Ali v. State of U.P.*, AIR 1957 SC 366]. This maxim does not occupy the status of law in Malaysia. However, sometimes, counsels do argue that if a part of the evidence given by a witness has been disbelieved, the whole of it should also be disbelieved, as a rule of law. In my view, such line of argument may hold water now in this juncture, provided the judge is convinced at the *prima facie* stage that a prudent man ought to, under the circumstances of the particular case, act upon the supposition that it does not exist.

13. When a person is bound to prove the existence or non-existence of any fact, then it is said that the burden of proof lies on that person. Burden of proof can be defined as the obligation, which is imposed on a party to adduce sufficient evidence in support of his vital contention to result in over all success by him in his case. This is sometimes referred to by some authors as burden of proof simpliciter or the persuasive burden or probative burden or the risk of non-persuasion or burden of proof on the pleadings or fixed burden of proof or ultimate burden etc. The relationship between 'fact in issue' and 'burden of proof' is that,

A facts in issue are vital issues central to the allegation of the party and failure by him to adduce sufficient evidence in support of a fact in issue means that he has failed to discharge the legal burden and thus he will fail in his over all contention. Thus, it can be said that proof of 'fact in issue' is the *sine qua non* for establishing legal burden. In deciding the 'fact in issue', maximum
B evaluation test as asserted by the Federal Court in *Balachandran (supra)* must be meticulously followed.

[9] Before I can exercise my discretion to wind-up the company, I must ensure that the petitioner is a creditor and has *locus standi* to
C present the petition and then I must decide if the petitioner has *locus standi*, should the court exercise its discretion to wind-up the company on the facts of the case and justice of the matter taking into consideration the provisions of ss. 3 and 101 of EA 1950 for reasons I have explained earlier. I must say much thoughts have been advanced in this area of law by Mr. Srimurugan in his article titled "Winding Up
D of Companies under s. 218(1)(e) & 218(2)(a) of the Companies Act 1965 Practice & Procedure [2004] 2 CLJ xiii" and was useful for me to write this judgment.

[10] In *Ganda Holding Bhd v. Pamaron Holding Sdn Bhd* [1989] 2 CLJ
E 1014; [1989] 1 CLJ (Rep) 559, Siti Norma Yaakob J (as Her Lady then was) opined:

> Text book writers have approached the subject in many ways. 7(2) *Halsbury's Laws of England*, 4th Ed, lists the following persons as creditors:
>
> F
> (1) the assignee of a debt, if the assignment is not made while the creditor's petition is pending;
>
> (2) the equitable assignee of part of a debt;
>
> (3) the executor of a creditor, even before probate;
>
> G
> (4) a creditor in respect of a debt incurred by voluntary liquidation;
>
> (5) a secured creditor;
>
> (6) a judgment creditor;
>
> H
> (7) the holder of a debenture bond of an insolvent company which has not yet matured for payment;
>
> (12) generally any creditor whose debt is not genuinely disputed by the company on substantial grounds.
>
> I
> McPherson J in his book *The Law of Company Liquidation*, 3rd Ed, at p 45 sums up the situation in the following manner:

> It is obviously not easy to formulate a test, at once both simple and comprehensive, for determining who is entitled to apply for a winding up in the capacity of creditor. The applicant must be one who has a claim to be paid a sum of money by the company, but that sum need not be liquidated and it need not be presently payable. Nor is it essential that it should be recoverable by action for in *Re North Bucks Furniture Depositories Ltd* [1939] Ch D 690, a local authority, to which the company was indebted for unpaid rates, was held entitled to present a petition, although payment of its rates could be enforced only by distress and not by action. Conversely, the mere fact that there is some means of enforcing payment by the company is not itself sufficient to transfer the sum payable into a debt. A garnishee order does not as between the company and the garnishor create a relationship of debtor and creditor as to confer a right to have the company wound up. See the case of *In re Combined Weighing And Advertizing Machine Company* [1889] 43 Ch D 99. It would appear that the facts of each case have to be closely examined to appreciate whether the relationship of a creditor and a debtor exists.

[11] The petitioner in this case does not fall into any of those categories mentioned in s. 218(2) of CA 1965 as elaborated in *Ganda* case *(supra)*. My reasons are as follows:

(i) The petition states that the guarantee was given to the lenders.

(ii) The lenders consists of five corporate bodies.

(iii) The petitioner per se cannot be said to be the lender. At the most it can only be one of the lenders.

(iv) The petitioner has not identified its *locus standi* in the petition in clear terms to show that the petitioner can present the petition in the absence of other lenders, more so in Malaysia without obtaining a judgment according to the laws of Singapore as parties to the guarantee have agreed that the laws of Singapore will apply. Malaysian Courts will not have jurisdiction to enforce the laws of Singapore.

(v) The guarantee is drafted in a manner by lenders who are foreigners to exclude the jurisdiction of the Malaysian Courts.

(vi) The petitioner has blatantly abused the terms of the guarantee by filing this petition in Malaysia when the lenders did not want any of their dispute to be dealt by the Malaysian Courts.

[12] For reasons stated above, the petition ought to be dismissed in limine. Even assuming that I am wrong on the issue of *locus standi*, the petitioner must demonstrate in strict terms within the spirit and intent

of EA 1950 that the company is unable to pay its debts. In this case, there are a number of affidavits filed by the respondent disputing the debt. The claim of the petitioner is grounded on complicated questions and matters requiring proper investigation and it cannot be summarily determined by affidavit evidence. A person cannot be said to be a creditor, where the alleged debt is substantially disputed. Support for my proposition is found in a number of cases, to mention a few are as follows:

(a) In *Mann and Another v. Goldstein* [1968] 1 WLR 1091, it was stated that:

> That a creditor's winding up petition could only be presented by a creditor and since the debts upon which both the defendants founded their petitions were substantially disputed, neither of the petitioners were established as "creditors" of their two companies; and that, accordingly, neither was entitled to present a petition as neither had any *locus standi* in the companies court. Even though it appeared from the evidence that the companies were insolvent as the debts were substantially disputed the defendants ought to be restrained from proceeding on the petition.

(b) In *Re Lympne Investment Ltd* [1972] 2 All ER 385, it was held:

> that when a petition was based on a debt which was disputed, on substantial grounds, the petitioner was not a creditor within section 224(1) of the Companies Act 1948 who had the *locus standi* requisite for the presentation of a petition even if the company was, in fact insolvent; that the existence of a dispute on substantial grounds as to the existence of any debt defeated the contention that the company has, within section 223(a) "neglected" to pay the sum required by statutory demand and that, accordingly, the petition should in accordance with the modern practice be dismissed.

(c) In *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451, it was held that:

> Applying *Re Lympne Investments Ltd* [1972] 2 All ER 385, when a debt was disputed on substantial ground, the petitioner was not a 'creditor' clothed with *locus standi* to present a petition even if the company is insolvent.

(d) In *The Company v. Rameshwar Singh of Darbhanga* AIR [1920] Calcutta 1004, in dealing with a similar provision to s. 218(2) of CA 1965, Sandersan CJ opined:

> In this case the company alleged there was a *bona fide* dispute and they were willing to pay what was found due on the taking of an account. Now in this case we do not think it is necessary for us to decide finally whether there is a "disputed claim" in fact; it is sufficient for us to say that it appears to the Court (1) that on the materials before it there is ground for supposing that there is a *bona fide* dispute as to a substantial part of the debt on which the winding up winding petition was based; and (2) that the company is solvent. Under such circumstances the proper course is a suit: that course the respondent did adopt; and the suit which he instituted to recover the amount due to him has in fact been postponed until after the hearing of the suit by the company against him and his co-directors; under these circumstances we do not think that an order for winding up the company ought to have been made on the petition until the litigation involved in the two abovementioned suits had been disposed of.

(e) In *Tulsidas Lalubhai v. Bharatkhand Cotton Mills Co., Ltd* AIR [1914] Bombay 251, the court opined:

> If any general rule is to be laid down at all, it is easily obtained from the statute law. The principle upon which a company is to be wound-up, for all the purposes with which we are now concerned, is simply its inability to pay its just debts, and that inability is said to be indicated by its neglect to pay after proper demand made and the lapse of three weeks. It is quite clear however that any such neglect must be judged by reference to the facts of each particular case, and that, where the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is, on the face of it, genuine or merely a cloak of the company's real inability to pay just debts. In this case it is perfectly clear that the defence, whatever its ultimate result may be, has substance in it, for it is hardly even the petitioner-appellant's case that the company is unable to pay the debt it owes him. It has been stated here that he expects to obtain all his dues in full in the liquidation. Thus therefore it appears that the petitioner's object is to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the civil Courts, and this, we are both very strongly of opinion, is one of the worst abuses to which the winding-up sections of our statute law upon companies could be perverted.

(f) In *Chellaradh & Co. Ltd. v. M.V.K. Sundaram & Anor* AIR [1955] Mysore 122 Venkataramaiya C.J opined:

> I do not think that the provisions of the Companies Act can be availed of for obtaining an Adjudication of the right to obtain payment when it is contested and the finding involves such a

A detailed and lengthy investigation as is necessary for a decision in a suit. As stated in Palmer on "*Company Precedents*" para 2, Chap, III page 52:

> It is now well-settled that a petition for winding up with a view to enforce, payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs … A winding up petition is not to be used as machinery to try a Common Law action.

In *'Tulsidas Lalubhai v. Bharat Khand Cotton Mills Co., Ltd.'*, A.I.R. [1914] Bom. 251 (A) it is stated that:

> Where the defence is that the debt is disputed all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts.

In *'The Company v. Rameshwar Singh'*, A.I.R. 1920 Cal.1004(B) is an other case to the effect that "when a debt is *bona fide* disputed by a debtor company, it cannot be said to have 'neglected to pay' the debt". Beasley J. observed with reference to a similar petition in A.I.R. 1929 Madras 265.

Courts will never allow creditors of a company to invoke the assistance of the Companies Act for getting of their debt. If there is genuine dispute with regard to the debt, then the creditor of the company must be referred to a suit.

An order for winding up a company is a compulsory process to be thought of when the conditions mentioned in the section are satisfied and implies exercise of discretion. It is not to be sought for as a short cut and cheap device to coerce payment and stifle contest. The mere failure of payment cannot be treated as a decisive factor to entitle a party invoking the aid of the section or as a ground for the Court embarking on an elaborate inquiry for the purpose of determining complicated questions as if it is a snit to be tried though no court-fee is paid. The apathy to the proceedings shown by the Respondents by their absence indicates want of interest and that they are not seriously mindful of the result. This may be due to the respondents being content with the remedy available by means of a suit.

(g) In *Re British India General Insurance Co.* AIR [1971] Bombay 102, when dealing with complex clauses in an indemnity contract relating to winding up petition, the court opined:

> These are amongst others the several complex questions and the petitioner insists upon their determination under pressure or threat of a winding up petition. This is not a case where the

Company has denied its liability on frivolous or vexatious ground. The denial of liability by the Company is based upon substantial grounds. When such is the case, it cannot be said that the Company has neglected to pay the debt within the meaning of Section 434(1)(a) of the Companies Act. To permit the petitioner to agitate all the questions by resorting to a winding up petition will be an abuse of the process of the Court. The only ground on which the inability to pay the debts is pleaded is the neglect to pay the debts is pleaded is the neglect to pay within the meaning of Section 434(1)(a) of the Companies Act. It is not the case of the petitioner that the Company is commercially insolvent or is in insolvent circumstances.

[13] For reasons stated above, I take the view that the company court is not the forum to deal with disputed debts. On the facts of this case, it is my judgment that the petitioner has no *locus standi* to present this petition and the debt is *bona fide* disputed and the petitioner has not proved their case according to law. I also take the view that the petitioner here has abused the process of this court when in the agreements they have entered into with the respondent they have in clear terms excluded the jurisdiction of Malaysian Courts and by breaching this salient term of the agreement they must have not only embarrassed the respondent but must have caused great loss to them. This court will not allow an injustice to pass through and will order suitable relief to the aggrieved. In the circumstance of the case it will be appropriate to order assessment of damages against the petitioner notwithstanding the general rule that a Companies Winding Up Court will not entertain a claim for damages. In this case exception must be made as the petitioner is foreign based and should not be allowed to avoid the jurisdiction of the Malaysian Courts after having abused its process. This court has powers and jurisdiction to do so where justice demands. [See *R Rama Chandran v. The Industrial Court Malaysia & Anor* [1997] 1 CLJ 147 FC]. In consequence, I dismiss the petition with costs to the respondent with an order that the assessment of damages incurred by the respondent is to be made before the registrar. I hereby order so.